87-479

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ENERGY COOPERATIVE, INC.,
JAY A. STEINBERG, TRUSTEE,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1243

IN THE MATTER OF:
ENERGY COOPERATIVE, INC.,
a Delaware corporation,

Bankrupt-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 3556—**Charles P. Kocoras**, *Judge.*

ARGUED SEPTEMBER 3, 1986—DECIDED MARCH 24, 1987

Before CUDAHY, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Energy Cooperative, Inc. ("ECI") appeals the dismissal of its suit against Phillips Petroleum Company ("Phillips") to recover more than $7.3 million which ECI claims is a voidable preference under section 547(b) of the Bankruptcy Code. 11 U.S.C. § 547(b) (1982). We conclude that this cause of action is barred by res judicata and accordingly affirm the decision of the district court.

I.

ECI operated a petroleum refinery in East Chicago, Indiana. In the course of its business, ECI traded petroleum products pursuant to "exchange agreements" with other

oil companies, including the defendant-appellee, Phillips. Under these exchange agreements, ECI

> agreed to deliver various types of crude oil, refined oil and/or other oil and petroleum products to various suppliers, refineries and/or distributors at various locations throughout [t]he United States . . . in exchange for the respective agreements of such suppliers, refineries and/or distributors to deliver such crude oil, refined oil and/or other oil and petroleum products to ECI.

In re Energy Cooperative, Inc., No. 81-B-005811 (Bankr. N.D. Ill. June 19, 1981) (the "Compromise Authorization Order").

ECI filed a voluntary petition in bankruptcy under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (1982),[1] on May 15, 1981. The company operated as debtor-in-possession under chapter 11 until May 31, 1984 when the case was converted to a proceeding under chapter 7.

On June 19, 1981, the bankruptcy court entered an order authorizing ECI to compromise, settle and collect balances that were owed to it under its pre-bankruptcy exchange agreements. Compromise Authorization Order. The court found that, due to falling oil prices, swift settlement of the exchange agreements was in the best interests of ECI and its creditors. *Id.* at 7. The order provided, in relevant part, as follows:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:
>
> 1. That the Debtor be, and it hereby is, authorized, without any appraisal or further notice to, hearing, or approval by, this Bankruptcy Court, or any creditors, entities, or parties in interest:

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[1] Because ECI filed its bankruptcy petition prior to the effective date of the 1984 amendments to the Bankruptcy Code, the bankruptcy issues in this case are governed by the Code prior to its amendment. The citations to the Code will be to its pre-amendment version.

(i) to effect and authorize the taking by the Exchange Partners of various set-offs arising from any business dealings of ECI with the Exchange Partners, to which the Exchange Partners may be entitled;

(ii) to negotiate and agree with each of the Exchange Partners upon a final settlement and liquidation of the obligations remaining under each respective Exchange Agreement; and

(iii) where appropriate, to adjust and compromise any disputed amounts or obligations owing under the Exchange Agreements; provided, that the Debtor shall make no adjustment, compromise or settlement of any amounts or obligations owing under the Exchange Agreements, which adjustment, compromise or settlement, if it had been made prior to the commencement of this reorganization case, could be avoided by the Debtor or a trustee, pursuant to applicable provisions of the Bankruptcy Code[.]

Id. at 9-10. Subparagraph (iii) was modified on July 23, 1981 by order of the bankruptcy court to clarify its scope and extent. *In re Energy Cooperative, Inc.*, No. 81-B-005811 (Bankr. N.D. Ill. July 23, 1981). The amendment of this provision became effective, *nunc pro tunc*, as of June 19, 1981, and provided:

(iii) where appropriate, to adjust and compromise any disputed amounts or obligations owing under the Exchange Agreements, provided, however, that the Debtor has no authority to settle, adjust or compromise any claim, cause or right, which claim, cause or right could form the basis of any cause of action which may be brought pursuant to any avoiding or recovery provisions of the *Bankruptcy Code*.

Id. at 3.

Acting pursuant to the Compromise Authorization Order, ECI attempted to collect an exchange account balance due from Phillips.[2] The parties did not dispute the amount owed, only the form of payment. Phillips declined to pay ECI in cash, claiming that under the terms of their exchange agreement, ECI was only entitled to delivery of product. ECI then filed a complaint in bankruptcy court alleging that Phillips owed ECI $1,564,666.97 for petroleum that ECI had over-delivered to Phillips under the exchange agreement. Complaint to Recover Exchange Balance ¶ 6. ECI subsequently agreed to accept delivery of product in settlement of this action, and the suit was dismissed on ECI's motion on September 22, 1982. *In re Energy Cooperative, Inc.*, No. 81-B-05811 (Bankr. N.D. Ill. Sept. 22, 1982). The order dismissing the suit stated that the proceeding was dismissed "with prejudice" and did not provide that ECI reserved the right to litigate any other issues arising from its exchange agreement in subsequent suits involving Phillips.

On October 14, 1982, ECI filed a complaint against Phillips which forms the basis of the suit before us.[3] ECI seeks recovery of $7,320,762.00 that it transferred to the defendant on account of debts owed by ECI under their exchange agreement. Complaint to Recover Preferential Transfer ¶ 6. The theory of ECI's present suit is that the money transferred by ECI was a preference under section 547(b) of the Bankruptcy Code, 11 U.S.C. 547(b)

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[2] There seems to be some confusion as to the number of exchange agreements between ECI and Phillips. Phillips refers to an exchange agreement in its brief. ECI's complaint in this proceeding, on the other hand, discusses multiple agreements. The resolution of this discrepancy is not critical to the determination of the questions before us. For the sake of convenience, we shall refer to a single agreement between the parties.

[3] ECI, as debtor-in-possession, filed the complaint in the instant proceeding. Thereafter, the bankruptcy case was converted to a proceeding under chapter 7, and a trustee was appointed on July 12, 1984. For the sake of convenience, we shall continue to refer to the appellant as "ECI."

(1982), and the transfer was, therefore, voidable by ECI. *Id.* ¶ 9. Phillips subsequently moved to dismiss the proceeding as res judicata, contending that the dismissal of the earlier suit to collect the exchange account balance barred any further litigation arising out of Phillips' exchange agreement with ECI.

On November 7, 1985, the district court, which had assumed jurisdiction by withdrawing the reference of this case to the bankruptcy court, granted Phillips' motion on the basis of both res judicata and equitable estoppel. *In re Energy Cooperative, Inc.*, Nos. 81-B-5811, 82-A-3736, 85-C-3556 (N.D. Ill. Nov. 7, 1985) ("Transcript of Proceedings"). With respect to equitable estoppel, the court found that ECI never claimed during the pendency of the account balance suit that it was entitled to recover the $7.3 million that it had previously transferred to Phillips. Accordingly, if Phillips had been made aware that ECI intended to assert this preference claim, it would have recognized its status as a creditor of ECI and would never have transferred $1.5 million of petroleum products to the bankrupt in the account balance settlement. The court found that the present suit was also barred by res judicata because the alleged preference arose out of the same exchange agreement that was the subject of the earlier suit. On January 29, 1986, the district court denied the trustee's motion to vacate its earlier ruling granting Phillips' motion to dismiss. *In re Energy Cooperative, Inc.*, Nos. 85-C-3556, 81-B-5811, 82-A-3736, mem. op. (N.D. Ill. Jan. 29, 1986) ("mem. op."). This appeal followed.

II.

Because the prior litigation was brought in federal court, the federal rule of res judicata determines whether the account balance suit bars ECI from maintaining this action. *See Restatement (Second) of Judgments* § 87 (1982); 18 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 4466 (1981); Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 769 (1976).

For res judicata to apply, three requirements must be met: (1) an identity of the parties or their privies; (2) an identity of the causes of actions; and (3) a final judgment on the merits. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *see also Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 595 n.9 (7th Cir. 1986); 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶¶ 0.410[1], 0.411[1] (2d ed. 1984). The only disputed requirement in this case is whether there is a sufficient identity of the causes of action.

The district court, in dismissing ECI's suit, applied the "operative facts" or "same transaction" test to define "cause of action," Transcript of Proceedings at 5-6, which is the dominant definition applied in this circuit. Under this test, a "cause of action" consists of " 'a core of operative facts' which give rise to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 854 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1492 (1986)); *see also Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied*, 469 U.S. 830 (1984); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 944 (7th Cir. 1981).

ECI contends that we should apply an ostensibly narrower definition of "cause of action" than that applied by the district court. According to ECI, to determine whether two suits arose out of a common core of operative facts, the appropriate question is whether the same evidence could support both claims. Appellant's Brief at 23-25. ECI also argues that we should apply a second test, apart from the operative facts test, under which the similarity of the claims is assessed with emphasis on the source of the rights and injuries at issue. *Id.* at 30. To support its position, ECI relies primarily on cases applying Illinois res judicata law, which employ these narrower formulations of the standard for claim preclusion. *See, e.g., Redfern v. Sullivan*, 111 Ill. App. 3d 372, 376, 444 N.E.2d 205, 208

(4th Dist. 1982); *City of Elmhurst v. Kegerreis*, 392 Ill. 195, 205-06, 64 N.E.2d 450, 454 (1945).[4]

As noted, however, because the prior suit in this case was adjudicated in federal court, the federal res judicata law governs, and the federal rule seems less demanding than that applied by the Illinois cases cited by ECI. This court recently endorsed the approach of section 24 of the *Restatement (Second) of Judgments* (1982): "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost." *Car Carriers*, 789 F.2d at 593.[5] This is, therefore, the approach we apply here.[6] Applying the federal definition of "cause of action,"

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[4] Although ECI contends that Illinois courts apply a narrow definition of "cause of action," Illinois case law is not as monolithic as ECI implies. As we recently noted in *Hagee v. City of Evanston*, 729 F.2d 510, 513 (7th Cir. 1984), the decisions of the Illinois appellate courts on this question seem to break down into two camps. In the first group are those cases such as *Redfern v. Sullivan*, 111 Ill. App. 3d 372, 376, 444 N.E.2d 205, 208 (4th Dist. 1982), that look to the overlap in the proof or evidence necessary to sustain both claims. The second group of cases employs the broader transactional approach, *see, e.g., Radosta v. Chrysler Corp.*, 110 Ill. App. 3d 1066, 1069, 443 N.E.2d 670, 673 (1st Dist. 1982). Because we conclude that federal law defines "cause of action" in this case, we need not opt between these competing strands of Illinois case law.

[5] The approach of the *Restatement (Second) of Judgments* has become "the present trend among courts nationwide." 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶ 0.410[1], at 359 (2d ed. 1984) (footnote omitted).

[6] Although the plaintiff does cite several cases from this circuit in support of its position, none of these cases persuades us that we should apply the apparently narrower definition of "cause of action" encompassed by the "same evidence" or "right/duty" formulations.

Thus, in *Kernel Kutter, Inc. v. Fawcett Publications, Inc.*, 284 F.2d 675 (7th Cir. 1960), the plaintiff claimed that he was injured by the defendant's publication of a fishing method previously sold by the plaintiff through advertisement in defendant's magazine. The plaintiff initially brought two counts, one based on libel and

(Footnote continued on following page)

the district court concluded that the account collection litigation and the present suit arose out of the same core of operative facts because "the rights and obligations of the parties under the exchange agreements were a necessary factual underpinning for the preference case and were fully settled in the first lawsuit." Mem. op. at 3-4. We agree that the present suit is barred because it involves the same "cause of action" as the account balance suit. Both claims arose out of the same transaction, the exchange of petroleum products between ECI and Phillips pursuant to their exchange agreement. The first suit alleged that ECI over-delivered petroleum products to Phillips under the agreement, and the present suit contends that ECI can set aside as a voidable preference payments

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[6] *continued*

one based on wrongful public disclosure of confidentially imparted trade information. The court simply held that the dismissal of one count because it was brought outside of the applicable statute of limitations was not res judicata as to the other count which was governed by a longer statute of limitations. *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982), is equally unhelpful to the plaintiff because the court there was applying Illinois res judicata law. The plaintiff's reliance on *Himel v. Continental Illinois Nat'l Bank and Trust Co.*, 596 F.2d 205 (7th Cir. 1979), is similarly misplaced. The test applied by the court in that case was whether "both suits arise out of the same basic factual situation." *Id.* at 209. Although *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981), does suggest that the "right/duty" approach is an acceptable methodology, that case treated that method of analysis as a secondary approach and referred to the "transactional approach" as the "primary test." *Id.* at 944. We also agree with the recent opinion in *Car Carriers* in which this court said that

> an unsuccessful party ought not be able to "frustrate the doctrine of *res judicata* by cloaking the same cause of action in the language of a theory of recovery untried in the previous litigation." 657 F.2d at 945. Therefore, the "right-duty" approach should not be used as a substitute for the "same transaction" test absent compelling circumstances and a clear showing that such a substitution will not undermine the policies of res judicata.

789 F.2d at 594-95 (quoting *Harper Plastics*, 657 F.2d at 945). No such showing has been made in this case.

by ECI for product delivered by Phillips under the agreement.[7] Both the account balance claim and the preference claim involve the reconciliation of the balance of the exchange agreement. The contract claim is for the total balance; the preference claim asks the court to look at transactions for the last 90 days only and net these out. Because each claim seeks to reconcile the parties' obligations under their contract and because the time periods covered by the two claims overlap, we conclude that the two arise out of the same transaction.

The link between the two claims is also supported by the relationship between the claims and Phillips' right of setoff. Phillips contends that if we were to allow ECI to split its claims, Phillips would be unable to raise as a defense its right to offset the amount it owed ECI for over-delivery of product against the approximately $7.3 million ECI would owe Phillips if that amount were set aside as a voidable preference. The district court relied on the potential prejudice to Phillips' setoff right, noting that "[h]ad Phillips known that ECI intended to assert its right to avoid the preferential transfers, Phillips would have recognized its status as a creditor, rather than a debtor, of ECI. Instead, Phillips transferred $1.5 million

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[7] Contrary to ECI's assertion, Appellant's Brief at 33, the fact that this suit was brought under the preference provisions of section 547(b) of the Bankruptcy Code and the prior proceeding was a contract suit does not mean that the two suits are separate causes of action. The fact that the claims have different legal bases does not by itself create separate causes of action. *See Car Carriers*, 789 F.2d at 593; *Alexander*, 773 F.2d at 854.

ECI relies heavily on *In the Matter of Silver Mill Frozen Foods, Inc.*, 32 Bankr. 783 (Bankr. W.D. Mich. 1983), to establish that its two suits against Phillips do not involve the same cause of action. The bankruptcy court in *Silver Mill*, however, applied the Michigan law of res judicata which employs the narrower definition of cause of action adopted by some Illinois courts: "Under Michigan law, the central test in determining whether two proceedings involve the same cause of action is whether the same evidence would sustain both actions." *Id.* at 786 (citation omitted).

worth of petroleum products to ECI." Transcript of Proceedings at 5. We find that the very fact that Phillips could have raised the $1.5 million as a setoff in the first suit, without reference to whether Phillips *still* may offset this amount, supports our conclusion that the two claims constitute the same cause of action.

ECI contends that Phillips did not have the right to offset the amount it owed ECI under the exchange agreement against the $7.3 million ECI would owe Phillips if that amount were set aside as a voidable preference. ECI argues that Phillips' right to setoff arises under section 553(a) of the Bankruptcy Code. Section 553(a) provides, in relevant part:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . .

11 U.S.C. 553(a) (1982). While Phillips' debt to ECI clearly arose pre-petition, ECI argues that its debt to Phillips arose post-petition: "Obviously, a claim arising from the post-petition avoidance of a preference cannot have arisen pre-petition." Appellant's Reply Brief at 20.

Phillips relies on *In re Nepsco, Inc.*, 55 Bankr. 574 (Bankr. D. Me. 1985), to establish that it would have been able to assert a right of setoff had ECI raised the preferential transfer claim in the earlier suit. In *Nepsco*, the trustee sued Contractors Group, Inc. ("CGI") seeking to recover preferential transfers in the amount of $6,221.56 allegedly made by the debtor to CGI. CGI owed the debtor $7,250.00 arising from pre-petition debts. CGI contended that the trustee met his burden of proof on all the elements necessary to recover a preferential transfer, except for the requirements of 11 U.S.C. § 547(b)(5). Section 547(b)(5) provides that the trustee may avoid a transfer of the debtor's interest in property

> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (a) the case were a case under chapter 7 of this title;
>
> (b) the transfer had not been made; and
>
> (c) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b)(5) (1982). CGI's position was that if it did not receive the alleged preferential transfers, it would have had the right under section 553(a) to offset the amount it owed the debtor against the amount the debtor allegedly owed CGI. The trustee in *Nepsco* raised the same argument advanced by ECI in this case: "The trustee claims that as a result of the preferential transfers, CGI had no claim against the debtor's estate at the time of the filing of the Chapter 7 petition and therefore had no claim which would be the subject of a setoff under 11 U.S.C. § 553." 55 Bankr. at 575-76. The court rejected the trustee's argument, reasoning that the sole issue before it was "whether CGI, in receiving the pre-filing payments from the debtor, received more than it would have received had the payments not been made." *Id.* Section 553 was relevant only to the extent that it bore on the question of what CGI would have been entitled to had the alleged preferential transfers not been made. If the debtor had not paid its pre-petition debt of $6,221.56 to CGI, CGI would have been entitled to a right of setoff under section 553(a).

The reasoning in *Nepsco* supports the conclusion that in the case before us the two suits involve the same cause of action. Had ECI raised the preference issue in its account balance suit, Phillips could have asserted its right to offset the $1.5 million balance it owed ECI under their exchange agreement against the $7.3 million ECI would owe Phillips if that amount were set aside as a voidable preference. The net result would be that Phillips would have to transfer a total of $7.3 million as a preference,

and ECI would owe Phillips $5.8 million (the $7.3 million it would owe Phillips at the time Phillips repays that amount less the $1.5 million Phillips owed it).[8]

III.

ECI contends that even if the two suits involve the same cause of action, this case must be distinguished from the normal operation of the doctrine of res judicata because the bankruptcy court reserved ECI's right to bring voidable preference claims. If a court reserves for later resolution an issue that might otherwise have been ad-

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[8] Phillips also argues that it would be prejudiced if ECI is permitted to bring the preference claim in a separate suit. Phillips claims that it lost its setoff right once it transferred the $1.5 million to ECI in settlement of the first suit. Thus, if we allow ECI to split its claims, Phillips must transfer a total of $8.8 million to ECI (the sum of $7.3 million and $1.5 million), and ECI would owe Phillips the total amount returned as a voidable preference, $7.3 million.

If Phillips has not lost its setoff right, it would not be any worse off if we allow ECI to split its claims because Phillips would then transfer $5.8 million to ECI (the $7.3 million preference less the $1.5 million it already transferred) and ECI would owe Phillips the entire amount of the preference, $7.3 million. It is unclear whether Phillips in fact has lost its setoff right by paying the $1.5 million to ECI. The case law is split on this issue. *Compare In re Wilson*, 49 Bankr. 19 (Bankr. N.D. Tex. 1985) (United States waived right by failing to assert setoff prior to paying out tax refund) and *In re Royal Crown Bottling Co., Inc.*, 29 Bankr. 52 (Bankr. N.D. Ala. 1981) *with In re Archer*, 34 Bankr. 28 (Bankr. N.D. Tex. 1983) (bank, which turned over property to trustee, had lost any opportunity that it might have had to effect a setoff but proceeds turned over were cash collateral that debtor could not use without consent of bank or a court order). ECI appears to concede that Phillips, by virtue of paying over the $1.5 million, has not lost whatever setoff rights it initially had. Appellant's Reply Brief at 19. If Phillips has not lost its setoff right, that fact goes only to the issue of prejudice. The very fact that Phillips has the right to setoff the account balance against the amount of the preference shows the interrelationship between ECI's two claims.

judicated in the initial proceeding, res judicata will not operate to bar the subsequent suit. *See Restatement (Second) of Judgments* § 26(1)(b), comment b (1982). According to ECI, the Compromise Authorization Order issued by the bankruptcy court effectively reserved its right to bring this later suit. The bankruptcy court, through its order, authorized ECI to settle the account balance claims because of the need for prompt action resulting from the declining oil price, but the court set aside any other claim "which may be brought pursuant to any avoiding or recovery provisions of the *Bankruptcy Code*," including preference claims, for later disposition. Compromise Authorization Order § 1(iii). ECI argues that neither the bankruptcy court nor the parties believed at the time the account balance suit was settled that any further litigation between the parties arising from the exchange agreement would be precluded. ECI contends that it did not believe that it had the authority to compromise voidable preference claims under the order and that Phillips was aware of the order and its limitations on ECI's settlement powers. ECI also argues that the bankruptcy court, by approving settlement of the account balance suit, did not intend to prevent ECI from bringing this later suit; had the court believed that the earlier suit would settle all claims between ECI and Phillips arising out of the exchange agreement, including more than $7.3 million worth of preference claims, the court would have informed ECI's other creditors and would have held a hearing to determine that settlement of the claims was in the best interests of the bankrupt and its creditors.

Phillips contends that although it had notice of the Compromise Authorization Order at the time it settled the account balance suit with ECI, it did not interpret this order as preventing ECI from settling its preference claims against Phillips. Under Phillips' interpretation of the order, ECI was only prohibited from compromising preference claims with exchange partners who disagreed with ECI as to the amounts due under the exchange agreements. The restriction on ECI's ability to com-

promise claims other than account balances is contained in section 1(iii) of the order that authorizes ECI "to adjust and compromise any disputed amounts or obligations owing under the Exchange Agreements." Compromise Authorization Order § 1(iii). Section 1(ii), which does not contain a similar restriction, authorizes ECI "to negotiate and agree with each of the Exchange Partners upon a final settlement and liquidation of the obligations remaining under each respective Exchange Agreement." *Id.* § 1(ii). Phillips contends that because section 1(ii) did not contain a restriction comparable to that found in section 1(iii), ECI was not prohibited from settling preference claims in conjunction with account balances settled under section 1(ii). Phillips further argues that because it and ECI did not dispute the amount at issue under their exchange agreement, they settled their exchange balance pursuant to section 1(ii) of the order, and ECI thus also compromised its preference claims against Phillips when it agreed to settlement of the first suit. Phillips believes that the dichotomy in ECI's authority set up in section 1(ii) and section 1(iii) is explained by that fact that if "ECI and its exchange partner agreed as to the amount due [this] would be some insurance that the estate was receiving all it was entitled to." Appellee's Brief at 24.

Phillips' interpretation of the Compromise Authorization Order is not persuasive. Whether ECI may give up more than $7.3 million worth of preferences cannot reasonably be predicated on whether ECI and its exchange partner agree on the amount owed under their exchange agreement. If ECI and Phillips agree on the exchange balance amount, there is some assurance that the bankrupt is getting everything to which it is entitled with respect to the exchange balance claim. Agreement does not ensure, however, that the bankrupt is getting everything to which it is entitled with respect to other claims, including preferences. Further, even if we were to accept Phillips' interpretation of the order, we would still find that ECI was not authorized to compromise its preference claims against Phillips. Section 1(iii) of the order authorized ECI

"to adjust and compromise any disputed amounts *or obligations* owing under the Exchange Agreements." Compromise Authorization Order § 1(iii) (emphasis added). While the parties did not dispute the *amount* owing under their agreement, they did dispute the *obligation*. Their quarrel with the obligation involved whether payment should be made in the form of cash or petroleum products. Thus, ECI was not authorized by the Compromise Authorization Order to settle any preference claims it might have against Phillips.

The most plausible interpretation of the Compromise Authorization Order is that the bankruptcy court intended to prohibit ECI from compromising any claim arising under the Bankruptcy Code, whether or not the parties disputed their obligations under the exchange agreements. Nonetheless, it is inescapable that, although the Compromise Authorization Order prohibited ECI from settling its preference claims, this order was modified as to Phillips when the court approved the settlement of the account balance suit "with prejudice." In settling the account balance suit, the burden was on ECI to preserve any further claims it might assert against Phillips arising out of their exchange agreement. If the order dismissing the first suit had not indicated that it was dismissed with prejudice, the reservation in the Compromise Authorization Order might have been sufficient to reserve ECI's right to bring subsequent suits. The order dismissing the account collection case, however, was not silent on the question of ECI's right to pursue future claims against Phillips. The suit was dismissed "with prejudice," indicating that the order barred any subsequent suits on the same cause of action. *See, e.g., Phillips v. Shannon*, 445 F.2d 460, 462 (7th Cir. 1971) (" '[A] dismissal with prejudice is a final judgment on the merits which will bar a second suit between the same parties for the same cause of action.' ") (quoting *Cleveland v. Higgins*, 148 F.2d 722, 724 (2d Cir.), *cert. denied*, 326 U.S. 722 (1945)); *Pfeiffer Co. v. United States*, 385 F. Supp. 367, 371 (E.D. Mo.

1974), *aff'd*, 518 F.2d 124 (8th Cir. 1975).[9] Thus, while the Compromise Authorization Order reserved ECI's right to assert preference claims, the order was modified as to Phillips by the court's dismissal of the account balance litigation with prejudice.[10]

An alternative, and at least equally valid, interpretation of the Compromise Authorization Order (although one not raised by either party) is that the order did not authorize ECI to split its claims. The order, by its terms, gave ECI the power to *settle* its account balance claims "without any appraisal or further notice to, hearing, or approval by, this Bankruptcy Court, or any creditors, entities, or parties in interest." Compromise Authorization

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[9] Phillips also contends that ECI cannot avoid the res judicata effect of the first action by claiming that the bankruptcy court failed to give proper notice to creditors or failed to make findings as to the propriety of ECI's settlement of the preference claims. Phillips argues that ECI could only challenge the validity of the prior action through a direct appeal. As we understand ECI's argument on this point, ECI is not attacking the validity of the bankruptcy court's dismissal of the account balance suit. Instead ECI raises the lack of notice to creditors and the absence of a hearing on the preference claims as a basis for inferring that the bankruptcy court did not intend to preclude ECI from subsequently raising its preference claims by dismissing the earlier suit with prejudice. ECI does not argue that the court's order dismissing the account balance suit should be amended because of the absence of notice and a hearing if, as we have found here, the order operates so as to bar ECI from bringing this preference claim. Thus, we need not determine whether ECI can collaterally attack the order dismissing the account balance suit.

[10] Even if Phillips had realized during negotiations to settle the account collection suit that the Compromise Authorization Order reserved ECI's right to bring this suit, Phillips would not be estopped from raising the order dismissing the first suit with prejudice as a defense in this case. The burden was not on Phillips to clarify the status of its setoff rights under the order dismissing the first suit. The burden was on ECI, the party seeking to bring the second claim, to ensure that that order was not inconsistent with the reservation of rights contained in the Compromise Authorization Order.

Order § 1. Pursuant to this order, ECI initially attempted to settle its account balance claim with Phillips without the participation of the bankruptcy court; ECI filed suit only after private settlement negotiations failed. If the two parties had been able to settle the contract claim without the participation of the court, ECI, under the terms of the Compromise Authorization Order, would not have been able to compromise any other claim it might have against Phillips arising out of their exchange agreement. Once ECI determined that it must file suit to recover the account balance due it, the Compromise Authorization Order and its attempted reservation of claims did not apply because that order focuses on ECI's attempt to *settle* only and not on lawsuits that ECI might file to bring about a resolution of the disputes. Viewed in this light, the Compromise Authorization Order has nothing directly to do with the complaint that ECI filed or with the disposition of the action based on it. Thus, ECI is barred by res judicata from bringing its preference claim because it did not raise this claim in its complaint in the contract suit.

IV.

Because we conclude that this suit is barred by res judicata, we need not consider whether ECI is equitably estopped from bringing this suit. The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—3-24-87—450

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

86-1243

IN RE:

ENERGY COOPERATIVE, INC., a Delaware corporation,

Debtor,

ENERGY COOPERATIVE, INC., a Delaware corporation,

Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,

Defendants.

DOCKETED
NOV. 22, 1986

Docket Nos. 81 B 5811
82 A 3736
85 C 3556

Chicago, Illinois
November 7, 1985
10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

MR. JAY STEINBERG
MR. ARTHUR FRIEDMAN
MS. PAMELA HOLLIS

Court Reporter: MS. JOENE HANHARDT

THE CLERK: 85 C 3536, ECI vs. Phillips Petroleum. Ruling.

MS. HOLLIS: Good morning, your Honor, Pamela Hollis on behalf of the defendant Phillips.

MR. STEINBERG: Good morning, your Honor, Jay Steinberg, Trustee.

MR. FRIEDMAN: Arthur Friedman for the Trustee.

THE COURT: Good morning.

Well, you won one in your absence, Mr. Steinberg.

MR. STEINBERG: Is that a leadup to —

THE COURT: Now that you are here, you are about to lose one.

I did not mean to take the suspence out of it for you, but —

MR. STEINBERG: I was waiting for your presentation, your Honor.

THE COURT: Okay. Let me give it to you.

MR. STEINBERG: If I leave, will it change the decision at all?

THE COURT: No. I have already written it out and it is too late. I cannot change it. It may be wrong, but I have written it out.

MR. STEINBERG: That is the way it is going to be. Okay.

THE COURT: This matter comes before the Court on the defendant Phillip Petroleum's motion to dismiss. For the following reasons, the motion will be granted.

On May 15, 1981, the plaintiff, Energy Cooperative, Inc., lovingly known as "ECI," filed a Chapter 11 petition. Pursuant to Section 1108 of the Bankruptcy Code, ECI operated its business as a debtor-in-possession. ECI obtained an order from the bankruptcy court authorizing it to liquidate balances owed ECI by various oil companies under exchange agreements. Under the order, however, ECI had "no authority to settle, adjust or compromise any claim . . . which could form the basis of any cause of action

which may be brought pursuant to any avoiding or recovery provisions of the Bankruptcy Code."

On May 2, 1982, ECI filed an adversary proceeding against Phillips Petroleum alleging that Phillips owed ECI petroleum products worth $ 1,564,666.97 as a result of exchange transactions on and prior to May 15, 1981. Acting pursuant to the bankruptcy court's order, Phillips and ECI reached a settlement as to the amount of gasoline due ECI. Following the delivery of the gasoline by Phillips, the bankruptcy court, on ECI's motion, dismissed the adversary proceeding with prejudice.

Approximately six months later, ECI commenced this action against Phillips, alleging that ECI is entitled to recover certain payments or deliveries of gasoline made by ECI under the exchange agreement as preferential transfers prohibited by the Bankruptcy Code. ECI alleges that the preferential transfers total $ 7,320,762 and no cents.

Phillips has moved to dismiss this action on the ground of res judicata. ECI maintains that the motion should be denied either because ECI was expressly prohibited from settling preference claims or because the first action to collect an exchange balance and the present action to avoid a preferential transfer are founded upon separate and distinct causes of action, so that judgment in the first does not preclude prosecution of the other.

When a valid final judgment on the merits is rendered in a judicial proceedings, res judicata operates to bar relitigation of the same cause of action between the same parties. Precisely what constitues the same cause of action is a matter of some complexity. Regardless of whether the action to collect the exchange balance and this action to avoid a preferential transfer are the same cause of action, or based on the same set of operative facts – a matter which I will address momentarily – the motion to dismiss must be granted for another reason: The Plaintiff's conduct in the first action estops it from now avoiding the preferential

transfers.

Equitable estoppel is defined as the effect of a party's voluntary conduct whereby the party is precluded from asserting rights which might otherwise have existed against another party who has, in good faith, relied upon such conduct and has been led thereby to change his position for the worse.

These elements are present here. ECI, as debtor-in-possession, voluntarily entered negotiations with Phillips to liquidate the balance due as a result of exchange transactions on and prior to May 15, 1981, the date ECI filed its Chapter 11 petition. Any payments or deliveries made by ECI up to May 15, 1981, were undoubtedly considered during the settlement discussions. ECI never asserted during these negotiations that it was entitled to recover some $7.3 million it had paid Phillips shortly before filing its bankruptcy petition. Phillips' reliance on ECI's conduct and the detrimental effect of such reliance are obvious. Had Phillips known that ECI intended to assert its right to avoid the preferential transfers, Phillips would have recognized its status as a creditor, rather than a debtor, of ECI. Instead, Phillips transfered $1.5 million worth of petroleum products to ECI.

ECI cannot now, after the bankruptcy court approved the settlement and Phillips delivered the products, assert its right to avoid the preferential transfers without unjustly affecting Phillips.

With respect to the res judicata argument and the question of whether the same set of operative facts are present in the preference action and the action to collect balances based on the exchange agreement, it is true that additional matters would have to be proved by the Trustee in order to prevail on the theory of a preferential transfer. But prior to those additional elements, it would be necessary to establish the rights and obligations of the parties under the exchange agreement with respect to all ship-

ments, deliveries and payments. That is a necessary factual underpinning for the preference case and it is precisely those matters which were at issue in ECI's initial suit, and it is precisely those things which were the subject matter of the parties' discussions and which ultimately led to the settlement of the lawsuit.

In that sense, the present preference case does indeed have the same set of operative facts as the initial suit, and I believe also that the other conditions necessary for res judicata are present here. The alleged preferential transfer, I believe, could have and should have been raised in the prior case. It is inherently unfair for a party to accept a settlement in its favor, but not advising the other side that, notwithstanding the apparent resolution of all matters arising out of the exchange agreement – which the alleged preference surely did arise out of – the small matter of some $7.3 million was still an open matter and would have to await another day of resolution.

The bankruptcy court, upon motion by ECI, dismissed the action with prejudice, apparently leading both parties to believe that final settlement of all obligations under the exchange agreement had been accomplished. In my view, it did – and that includes the instant action.

So, therefore, plaintiff's motion to dismiss will be granted.

MS. HOLLIS: Thank you very much, your Honor.

THE COURT: Okay.

MR. STEINBERG: So, in other words, we got about sixty or seventy thousand, but lost about seven million.

THE COURT: You came up short on $7.3 million. Okay?

MR. STEINBERG: Okay, your Honor.

THE COURT: I do not know if you are teetering. That is not exactly a good balance, but maybe the next

time around it will go better for you.

MR. STEINBERG: We will leave well enough alone, Judge.

THE COURT: I might suggest that since you were so successful without being here – I was not going to change my ruling since you showed up, but maybe next time you ought to give me two things to deal with and then get word outside on how I am wheeling.

MR. STEINBERG: We will see how you are running that day.

THE COURT: Okay.

MS. HOLLIS: Thank you, your Honor.

MR. STEINBERG: Thank you, Judge.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ JOENE HANHARDT November 11, 1985

Official Court Reporter

Appendix C

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge: CHARLES P. KOCORAS

* * *

Case Number: 85 C 3556 (81 B 5811)
(82 A 3736)

Date: Nov. 7, 1985
Case Title: ECI -v- PHILLIPS PETROLEUM CO.
dft mo/dismiss ans 9-23, reply 10-7, rule (in ct)

* * *

DOCKET ENTRY:

1 ☐ Judgment is entered as follows:
2 ☒ [Other docket entry:]

Ruling held. Defendant Phillips Petroleum Co.'s motion to dismiss is granted.

* * *

☒ Docketing to mail notices.
courtroom deputy's initials: /s/ AT

Number of Notices: 4 & MF 5
Date typed envelopes: Nov. 12 1985
Date Docketed: Nov. 12 1985
Mailing dpty. intials: MK

Document # 13

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	
ENERGY COOPERATIVE, INC., a Delaware corporation, *Debtor,*	No. 85 C 3556
ENERGY COOPERATIVE, INC., a Delaware corporation, *Plaintiff,*	No. 81 B 5811
v.	
PHILLIPS PETROLEUM COMPANY, *Defendant.*	No. 82 A 3736

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on the motion of the plaintiff, the trustee of the estate of Energy Cooperative, Inc., to reconsider the court's ruling on November 7, 1985, granting the defendant Phillips Petroleum's motion to dismiss. On that date, this court ruled that a prior adversary proceeding brought by ECI against Phillips to collect petroleum products owed ECI under exchange agreements barred the present action in which ECI sought to recover certain payments or deliveries of gasoline as preferential transfers. The court held that ECI's conduct in the first action equitably estopped ECI from recovering for the preferential transfers and that because the rights and obligations of the parties were established in the first proceeding, res judicata precluded relitigation of those rights and liabilities.

ECI argues that the court's holding that the preference

action is barred by equitable estoppel is erroneous because the factual findings upon which that holding is based are not supported by the record and that application of res judicata was improper because the two adversary proceedings are based on separate and distinct causes of action, because of the bankruptcy court's order prohibiting ECI as debtor-in-possession from compromising preference claims, and because ECI as debtor-in-possession is not in privity with the trustee.

After reviewing the parties' briefs, the court is not persuaded that its ruling dismissing the case was erroneous. Therefore, the motion to vacate that ruling will be denied. I will, however, address the plaintiff's contentions in some detail.

First, the trustee for ECI argues that the court's equitable estoppel holding is erroneous because it is based upon factual findings which are not supported by the record. The plaintiff has submitted a list of the findings not supported by the evidence. These findings range from the amount of time separating the adversary proceedings to ECI's failure to assert its right to avoid the preferential transfers while negotiating a settlement under the exchange agreements. The trustee's disputed findings are, however, either immaterial to the court's ruling or are legal conclusions or reasonable inferences drawn from undisputed facts in the record. The trustee does not dispute facts central to the court's finding of equitable estoppel: that ECI failed to inform Phillips that it intended to reserve its right to recover the allegedly preferential transfers in a subsequent proceeding, that the parties settled their claims arising out of the exchange transactions, and that the bankruptcy court approved the settlement and dismissed ECI's claims with prejudice. Thus, the court concludes that its ruling on the ground of equitable estoppel was based on legitimate findings of fact.

Second, the plaintiff argues that res judicata was

improperly applied because the elements to be proved to collect the exchange balances differ from those which must be proved to show a preferential transfer. The court acknowledged in its earlier ruling that the trustee would have to prove additional matters to prevail on the preferential transfer theory. Nevertheless, the court found that the rights and obligations of the parties under the exchange agreements were a necessary factual underpinning for the preference case and were fully settled in the first lawsuit. The court further found that it was inherently unfair for the trustee to accept a settlement in its favor but not advise Phillips that $7.3 million of transactions were still an open matter. Based on these findings, the court finds that res judicata was properly applied despite the necessity of proof of additional matters to show a preferential transfer.

Third, the plaintiff argues that the finding of res judicata fails to give effect to the bankruptcy court's order prohibiting ECI from compromising preference claims. Phillips contends that the bankruptcy judge's order did not prohibit final settlement of liquidated exchange balances, such as Phillips's. Even assuming, as the court did in its earlier ruling, that the bankruptcy judge intended to prohibit ECI from settling its preference claims against Phillips, the fact remains that ECI and Phillips reached an agreement as to the amount due ECI under the exchange agreements without considering ECI's ability to avoid certain transfers to Phillips. In essence, ECI did settle its preference claims and is bound by that agreement.

Last, the plaintiff argues that as trustee of the ECI estate, it is not in privity with ECI as debtor-in-possession, citing *In the Matter of Silver Mill Frozen Foods, Inc.*, 32 B.R. 783, 785-86 (W.D. Mich. 1983). In *Silver Mill*, the court found that under the facts of that case the trustee and the debtor-in-possession were not in privity, although it acknowledged that privity was the general rule. The circumstances of this case, particularly the fact that ECI as

debtor-in-possession instituted *both* the collection and preference actions, indicate that the trustee's and the debtor-in-possession's interests coincide so that the general rule of privity applies. That the trustee disagrees with ECI's actions does not destroy that privity.

Therefore, the plaintiff's motion to vacate the court's earlier ruling granting the motion to dismiss is denied.

/s/ CHARLES P. KOCORAS

Charles P. Kocoras
United States District Judge

Dated: 1/29/86

Appendix E

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge: CHARLES P. KOCORAS

* * *

Case Number: 85 C 3556 (81 B 5811)
(82 A 3736)

Date: January 29, 1986

Case Title: ECI -v- PHILLIPS PETROLEUM CO.

* * *

DOCKET ENTRY:

1 ☐ Judgment is entered as follows:
2 ☒ [Other docket entry:]

Enter Memorandum Opinion: The plaintiff's motion to vacate the court's earlier ruling granting the motion to dismiss is denied.

* * *

(12) [for further detail see
☐ order on the reverse of
☒ order attached to the original minute order form]

☒ Docketing to mail notices.

courtroom deputy's initials: /s/ AT

Document #7

Appendix F

F - 1

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

ENERGY COOPERATIVE, INC.,
Debtor.

ENERGY COOPERATIVE, INC.,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

EOD
SEP 27 1982

Chapter 11
81 B 05811

Adversary No.
82 A 1658

ORDER

At Chicago, Illinois, in
said District and Division
September 22, 1982

This matter coming on to be heard at the status report fixed herein; due notice having previously been given to all parties entitled thereto; counsel for the plaintiff having orally advised the court that the defendant has delivered to plaintiff all of the gasoline referred to in the complaint herein and that plaintiff has sold such gasoline for the benefit of this estate and all of its creditors and counsel for plaintiff has having orally moved for the entry of this order; there being no objection to the entry of this order; and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the above-captioned adversary proceeding be and it is hereby dismissed with prejudice, each party to bear its own costs.

ENTER: /s/ FREDERICK J. HERTZ
Bankruptcy Judge

Appendix G

G - 1

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 24, 1987.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

No. 86-1243

IN THE MATTER OF:
ENERGY COOPERATIVE, INC., a Delaware corporation,
Bankrupt-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85-C-3556

Charles P. Kocoras, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

Appendix H

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1987.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

No. 86-1243

IN THE MATTER OF:
ENERGY COOPERATIVE, INC., a Delaware corporation,
Bankrupt-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 3556

Charles P. Kocoras, Judge.

ORDER ON PETITION FOR REHEARING

The opinions in the above-entitled case, issued March 24, 1987, is modified as follows:

The last sentence of the carryover paragraph on page 10 of the slip opinion is deleted.

The following sentences are added at the end of the last paragraph of section II on page 12:

> Phillips claims that it lost its setoff right once it transferred the $1.5 million to ECI in settlement of the first suit. Thus, if we allow ECI to split its claims, Phillips must transfer a total of $8.8 million to ECI (the sum of $7.3 million and $1.5 million), and ECI would owe Phillips the total amount returned as a voidable preference, $7.3 million. If Phillips has indeed lost its right of setoff, Phillips would obviously be placed in a worse position by

ECI's splitting of its claims.[8]

The following footnote is substituted for footnote 8 as it appears on page 12 of the slip opinion:

> [8] If Phillips had *not* lost its setoff right, it would not be any worse off if we allow ECI to split its claims because Phillips would then transfer $5.8 million to ECI (the $7.3 million preference less the $1.5 million it already transferred) and ECI would owe Phillips the entire amount of the preference, $7.3 million. It is unclear whether Phillips in fact has lost its setoff right by paying the $1.5 million to ECI. Although ECI appears to concede that Phillips, by virtue of paying over the $1.5 million, has not lost whatever setoff right it initially had, Appellant's Reply Brief at 19, the case law is split on this issue. *Compare In re Wilson*, 49 Bankr. 19 (Bankr. N.D. Tex. 1985) (United States waived right by failing to assert setoff prior to paying out tax refund) and *In re Royal Crown Bottling Co.*, 29 Bankr. 52 (Bankr. N.D. Tex. 1983) (bank, which turned over property to trustee, had lost any opportunity that it might have had to effect a setoff but proceeds turned over were cash collateral that debtor could not use without consent of bank or a court order).

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellant, all of the judges on the panel have voted to deny the rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Appendix I

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, AT CHICAGO

IN RE:

ENERGY COOPERATIVE, INC., a Delaware corporation,

Debtor.

Bankruptcy No. 81 B 005811 (Chapter 11 Case)

ORDER GRANTING APPLICATION BY ENERGY COOPERATIVE, INC., DEBTOR-IN-POSSESSION (1) FOR AUTHORITY TO COMPROMISE, SETTLE AND COLLECT EXCHANGE BALANCES, (2) FOR AUTHORITY TO SELL INVENTORY AND CONTRACT RIGHTS UNDER EXCHANGE AGREEMENTS, AND (3) FOR AN ORDER FIXING BAR DATE AND APPROVING NOTICE THEREOF

At Chicago, Illinois, in and for said District.

The Application of Energy Cooperative, Inc., Debtor-in-Possession (hereinafter referred to as "the Debtor") (1) For Authority to Compromise, Settle and Collect Exchange Balances, (2) For Authority to Sell Inventory and Contract Rights Under Exchange Agreements and (3) For an Order Fixing Bar Date and Approving Notice Thereof (hereinafter referred to as "the Application"), having come on for hearing before this Bankruptcy Court, on the 18th day of June, 1981, at 10:00 a.m., with notice thereof having been given by Federal Express, or by messenger, to all parties entitled thereto, which parties are listed on the service list, a copy of which is attached hereto, made a part hereof by reference thereto, and labeled "Exhibit A" (hereinafter referred to as "the Service List"); and

Creditors, entities and parties in interest, having

made appearances on their own behalf and/or through counsel, and having expressed their views on the Application; and

David L. Shaffer, President of the Debtor (hereinafter referred to as "Shaffer") having testified that among the Debtor's assets are (i) certain rights under various exchange agreements (hereinafter referred to as "the Exchange Agreements"), under which (i) Energy Cooperative, Inc. (hereinafter referred to as "ECI") agreed to deliver various types of crude oil, refined oil and/or other oil and petroleum products to various suppliers, refineries and/or distributors at various locations throughout The United States of America, in exchange for the respective agreements of such suppliers, refineries and/or distributors to deliver such crude oil, refined oil and/or other oil and petroleum products to ECI at the various other locations, and (ii) the value of the respective delivery obligations of such suppliers, refineries and/or distributors exceed the value of ECI's respective delivery obligations; and

Shaffer having further testified that the Debtor possesses "wet barrel" inventory of approximately 2,602,000 barrels of crude oil and refined oil products, including approximately 406,000 barrels of asphalt, at its storage and refining facilities in East Chicago, Indiana and in Schererville, Indiana, and crude and refined oil products in various pipelines owned and operated by third parties and by ECI (hereinafter collectively referred to as "the Inventory"); and

Shaffer further having testified that under the Exchange Agreements, ECI owes crude oil, refined oil products and/or cash balances to various of the entities with whom ECI entered into Exchange Agreements (hereinafter referred to as "the Exchange Partners") and that, simultaneously, various of the Exchange Partners owe crude oil, refined oil products and/or cash balances to the Debtor; and

Shaffer further having testified that the value of the

products which are the subject matter of the Exchange Agreements, and therefore the value of the Debtor's right under the Exchange Agreements, varies according to the current market prices for the crude oil and refined oil products, which market prices can change significantly on a daily and even hourly basis, and that the present trend in such market prices is downward; and

Shaffer further having testified that the value of the Debor's rights under the Exchange Agreements can only be realized through the Debtor's simultaneous agreement with the respective Exchange Partners as to (i) the amount of crude oil and/or refined oil products owed to Debtor by any such Exchange Partner, and (ii) the price of such crude oil and/or refined oil products as of the time of such agreement; and

Shaffer further having testified that a recognized market and pricing standards exist for the various types of crude oil and refined oil products which are the subject matter of the Exchange Agreements and which are included in the Inventory of the Debtor, and that although current market prices and other information are readily available through publications such as *Platt's Oilgram*, such published market prices often lag behind and may not represent actual market prices; and

Shaffer having further testified that because of the history and possibility of significant, rapid market price changes, it would be impossible to obtain reliable and accurate appraisals of either the Inventory of the Debtor or its rights to receive crude oil and/or refined oil products under the Exchange Agreements; and

Shaffer further having testified that any delay in the liquidation and sale of the Inventory, and in the liquidation of the Exchange Agreements, in light of the current downward trend in the market prices, could result in substantial financial loss to the Debtor and all of the creditors of this estate, and that in light of the mutual claims and rights

of set-off that may exist under the Exchange Agreements or otherwise, he believes it to be in the best interests of the Debtor and its creditors that the Exchange Balances be liquidated, and that the Debtor be given authority to negotiate and agree with each of the Exchange Partners upon a final settlement of the obligations remaining under any Exchange Agreement, and to adjust and compromise, any disputed amounts or obligations owing under the Exchange Agreements, without any appraisal or further notice to, hearing on, or approval by, this Bankruptcy Court, or any other creditors, entities or parties in interest; and

Shaffer further having testified that by reason of the potential large swings in the market for crude oil and refined oil products, and the downward trend in market prices thereof, he believes it to be in the best interests of the Debtor and its creditors that the Debtor be authorized to enter into and consummate the sale or sales of the Inventory in such lots and in such a manner as the Debtor may deem appropriate, without any appraisal or further notice to, hearing on, or approval by, this Bankruptcy Court, or any creditors, entities or parties in interest; and

The Court, having examined the Application, having considered the testimony of Shaffer, the pleadings filed herein, and the arguments of counsel, having conducted a hearing on said Application, and being fully advised in the premises, does hereby make the following Findings of Fact:

(1) The notice of the Application given by Federal Express and by messenger to all the persons listed in the Service List, and the opportunity given to all persons and parties in interest for a hearing before the Court on the Application, were appropriate, adequate, and satisfactory in the particular circumstances of this case;

(2) The value of the Inventory, and of the various oil products which are the subject matter of the Exchange Agreements, and therefore the value of

the Debtor's rights under the Exchange Agreements and in and to the Inventory, are subject to swings in market prices, and may vary according to the current market prices for crude oil and refined oil products, and such market price swings can be significant;

(3) The current trend of market prices in oil products, which comprise the Inventory and which are the subject matter of the Exchange Agreements, is downward, and as a result, the value of the Inventory, and the value of Debtor's rights under the Exchange Agreements, has been decreasing in value;

(4) In light of the recognized market and pricing standards that exist for the various types of crude oil and refined oil products which are included in the Inventory and which are the subject matter of the Exchange Agreements, and in light of the rapid, significant changes which are possible in such market prices, it would be impossible to obtain reliable and accurate appraisals of any of the Inventory or of the Debtor's rights under the Exchange Agreements.

(5) A delay in the sale and liquidation of the Inventory and the Exchange Agreements, may cause substantial financial loss to the Debtor and the creditors of the estate;

(6) It is in the best interests of the Debtor and the creditors of the estate, that the Debtor be given authority, without any appraisal or further notice to, hearing on, or approval by this Bankruptcy Court, or any creditors, entities or parties in interest, to liquidate, compromise, sell and/or collect the Exchange Agreements and Inventory, upon the terms and conditions set forth in this Order;

(7) To establish and determine the validity and extent of all liens, claims, and interest of third parties with respect to the Inventory, and any proceeds thereof, a bar order should be entered, providing that all creditors, persons, or entities claiming any right, title or interest, including, but not limited to, any lien, security interest, or encum-

brance, in or to the Inventory, or any proceeds thereof, should be ordered and directed to assert such right, title or interest, and join or intervene, in the Adversary Proceeding, filed in this Bankruptcy Case, Adversary Proceeding No. 81A2075, filed on June 18, 1981, by the Debtor and Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as "Continental"), as Agent for itself and various lending banks (collectively, the "Banks"), on or before July 20, 1981, or forever be barred, estopped and enjoined from claiming or asserting any right, title or interest in or to any or all of the Inventory, or any proceeds thereof.

NOW, THEREFORE, on the basis of the Findings of Fact, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the Debtor be, and it hereby is, authorized, without any appraisal or further notice to, hearing, or approval by, this Bankruptcy Court, or any creditors, entities, or parties in interest:

   (i) to effect and authorize the taking by the Exchange Partners of various set-offs arising from any business dealings of ECI with the Exchange Partners, to which the Exchange Partners may be entitled;

   (ii) to negotiate and agree with each of the Exchange Partners upon a final settlement and liquidation of the obligations remaining under each respective Exchange Agreement; and

   (iii) where appropriate, to adjust and compromise any disputed amounts or obligations owing under the Exchange Agreements; provided, that the Debtor shall make no adjustment, compromise or settlement of any amounts or obligations owing under the Exchange Agreements, which adjustment, compromise or settlement, if it had been made prior to the commencement of this reorganization case, could be avoided by the Debtor or a

trustee, pursuant to applicable provisions of the Bankruptcy Code;

2. That, subject to the provisions of paragraph 4 of this Order, the Debtor be, and it hereby is, authorized to enter into and consummate the sale or sales of its Inventory consisting of asphalt, free and clear of all liens, claims, encumbrances and other interests, in such lots and in such manner as the Debtor deems appropriate, without any appraisal or further notice, hearing, or approval of any such individual sales by this Bankruptcy Court or any creditors, entities or parties in interest;

3. That upon the liquidation or sale of any or all Inventory consisting of asphalt and the receipt by the Debtor of cash proceeds thereof, the Debtor shall deliver such cash proceeds to Continental, as Agent for itself and the Banks, and Continental, as Agent for itself and the Banks, shall deliver such cash proceeds to the Banks, for provisional application by the Banks as provided in the Financing Order and the Financing Agreements, which provisional application shall be subject to further order of this Bankruptcy Court.

4. That the Debtor be, and it hereby is, authorized, without any appraisal or further notice to, hearing, or approval by, this Bankruptcy Court, or any creditors, entities or parties in interest, to sell any and all amounts of the Inventory, free and clear of all liens, claims, encumbrances and other interests, in such lots, upon such terms, and in such a manner as the Debtor deems appropriate, provided that the aggregate amount of any Inventory sold shall not include:

   (i) the aggregate amount of all of the Inventory against which liens, claims or interests are, as of the date hereof, specifically asserted by any third parties (as listed on "Exhibit B" attached hereto and made a part hereof), other than the Banks, whether such claims or interests are based upon an alleged security interest, reclamation right, a processing or throughput

agreement, or otherwise; and

(ii) prior to July 21, 1981, a reserve of Inventory as set forth on "Exhibit C" attached hereto and made a part hereof (the "Reserve"), in addition to the Inventory listed on Exhibit B, representing fifty percent (50%) of the amounts of each of the types of crude oil and refined oil products against which liens, claims or interests have, as of the date hereof, been asserted by third parties as listed on Exhibit B, to the extent such additional crude oil and refined oil products are in the possession of the Debtor as of the date hereof; and

(iii) an additional amount of Inventory representing amounts of each of the types of crude oil and refined oil products against which third parties assert liens, claims or interests after the date hereof and prior to July 21, 1981, as provided in paragraph 10 of this Order, to the extent that (x) such amounts, in the aggregate, exceed the Reserve, and (y) the Debtor has in its possession Inventory not included within subparagraphs (i) and (ii) immediately above;

but the aggregate amount of any Inventory sold may include:

(iv) the aggregate amount of all such other and further amounts of the Inventory subject to the claims or interests asserted by any third parties, as to the sale of which amounts any or all such third parties, other than the Banks, may now or hereafter consent; and

(v) after July 20, 1981, unless upon the application prior to July 20, 1981 of any creditor, entity or party in interest which has asserted a lien, claim or other interest in any portion of the Inventory this Bankruptcy Court orders otherwise, the aggregate amount of Inventory, if any, included in the Reserve against which third parties, other than the Banks, have not, as of the close of business on July 20, 1981, asserted liens, claims or interests, pursuant to

paragraph 10 of this Order; and

(vi) the aggregate amount of all such other and further amounts of the Inventory as to which a judgment by this Bankruptcy Court is entered, authorizing such sale free and clear of any and all liens, claims or other interests, as more specifically set forth in the Complaint filed in this reorganization Case in a certain Adversary Proceeding, Adversary Proceeding No. 81A2075 filed on June 18, 1981, by the Debtor and Continental, as Agent for itself and the Banks; and

5. That upon the liquidation, compromise, sale and/or disposition of any or all of the Exchange Agreements or the Inventory, except for any asphalt, the sales of which are dealt with in paragraph 3 above, and the receipt by the Debtor of the cash proceeds thereof, the Debtor shall deliver such cash proceeds to Continental, as Agent for itself and the Banks, to be deposited by Continental, as Agent for itself and the Banks, in the Debtor's cash collateral account with Continental, to be held and invested in said cash collateral account until the chairman of, or the duly authorized attorney for, the Unsecured Creditors' Committee consents in writing to their release, or until further order of this Bankruptcy Court, in either of which events said proceeds will be distributed by Continental to the Banks for provisional application by the Banks as provided in the Financing Order, which provisional application shall be subject to further order of this Bankruptcy Court;

6. That any liens, claims and interests asserted by third parties, other than the Banks, in any Inventory shall, to the extent such asserted liens, claims or interests are later found by this Bankruptcy Court to be superior to the liens, claims and interests of the Banks in such Inventory, upon the sale of any such Inventory by the Debtor, attach to the proceeds of any such sale, and shall continue in such proceeds after any provisional application of such proceeds by the Banks pursuant to paragraph 5 of this Order.

7. That for good cause shown, any and all requirements for any appraisal of all or any part of the Inventory of the Debtor or its rights under the Exchange Agreements are hereby waived.

8. That the Debtor be, and hereby is, ordered and directed to prepare, and file with this Bankruptcy Court, deliver to The United States Trustee, Continental, and the attorney for the Unsecured Creditors' Committee, on a weekly basis, schedules listing all of the Exchange Agreements, and all of the Inventory which have been liquidated, reduced to cash, and/or sold during the proceeding week, and the respective proceeds thereof;

9. That the Debtor be, and hereby further is, ordered and directed to retain at its offices, all relevant documents, including tickets, telexes, correspondence, and all other communications, evidencing any acquisition of Inventory or any such liquidation or sale of any of the Inventory, and the Exchange Agreements, with the complete internal records and accountings identifying purchases, prices, quantities and commodities relevant to any such sale.

10. That all creditors, entities, or parties in interest claiming any right, title or interest, including, but not limited to, any lien, security interest, or encumbrance, in or to all or any of the Inventory, or the proceeds thereof, be, and each of them is, hereby ordered and directed to assert such right, title or interest, by joining or intervening, on or before the close of business on July 20, 1981 in a certain Adversary Proceeding filed in this Bankruptcy Case, Adversary Proceeding No. 81A2075, filed on the 18th day of June, 1981, by the Debtor and Continental, as Agent for itself and the Banks, as Plaintiffs (hereinafter referred to as the "Adversary Proceeding"), and stating in any such joinder or intervention the grounds on which any such right, title or interest is or may be claimed or asserted, and that unless such joinder or intervention be effected by the close of business on July 20, 1981, any and all creditors, entities or parties in interest not a party to such Adversary Proceeding shall forever

be barred, estopped, and enjoined from claiming or asserting any right, title or interest in or to any or all of the Inventory, or any proceeds thereof; and

11. That the Debtor be, and hereby is, ordered and directed to send notice of the entry of this Order, and the terms of the bar order described in paragraph 10 above, by first-class mail, postage prepaid, to all creditors, entities, and parties in interest in this reorganization case, and to cause notice of the entry of this Order, and the terms of the bar order described in paragraph 10 above, to be published at least twice in *The Wall Street Journal*, with the second such published notice to be published not later than June 26, 1981, each such notice sent or published to be substantially in the form of Exhibit D attached hereto and made a part hereof by reference thereto.

12. The references in this Order and in the Application to Inventory of the Debtor, "the Inventory", or the like, shall be and are hereby directed to be without prejudice to the claims or interests of any parties, whether such claims or interests are based upon alleged security interests, reclamation rights, processing or throughput agreements, or otherwise.

SO ORDERED.
ENTER ORDER.
Dated: 6/19/81

/s/ FREDERICK J. HERTZ
Frederick J. Hertz
United States Bankruptcy Judge

APPROVED AS TO FORM AND CONTENT.

/s/ MILTON L. FISHER
Attorney for Continental Illinois National Bank and Trust Company of Chicago, individually and as Agent

/s/ ALLAN G. SWEIG
Attorney for Energy Cooperative, Inc., Debtor in Possession no objection

/s/ RICHARD M. BENDIX
Attorney for the Unsecured Creditors' Committed

/s/ FLOYD BABBITT
Attorney for Horizon Processing Company

/s/
Attorney for Vulcan Refining Company

/s/ LAURENCE H. KALLEN
Attorney for P & O, Falco, Inc.

/s/ J. MARK FISHER
Attorney for ARCO Pipeline Company

/s/
United States Trustee

/s/ WILLIAM E. KELLY
Attorney for Clark Oil & Refining Corporation

SCHEDULE OF CLAIMANTS TO INVENTORY

Name of Claimant	Amount Believed To Be Claimed Out of Inventory
The Permian Corporation	20,881.07 barrels, Wyoming General crude oil
Total Petroleum, Inc.	Unknown
Clark Oil & Refining Corporation	25,811 barrels, regular 13,240 barrels, unleaded
Hydrocarbon Transportation, Inc.	10,000 barrels, more or less ISO Butane
Sonatrach	502,813 barrels, Saharan crude oil
True Oil Purchasing Company	120,000 barrels, Wyoming oil; 171,000 barrels, Montana/ Dakota Sweet oil
West Texas Marketing Corporation	155,000 barrels, West Texas
Colonial Pipeline Company	2,000 barrels, No. 2 fuel
Giertz-Melahn Asphalt Co.	9,408 barrels, of asphalt
TIPCO Crude Oil Co.	75,000 barrels, regular gasoline
P & O Falco, Inc.	131,000 barrels, regular gasoline
ARCO Pipeline Company	approximately 35,000 barrels crude oil
Horizon Processing Company	1,882 barrels, regular gasoline 5,900 barrels, unleaded gasoline 10,023 barrels, No. 6 fuel 767 barrels, crude oil
Vulcan Refining Company	15,064 barrels, No. 6 fuel 18,264 barrels, regular gasoline

EXHIBIT B

SCHEDULE OF RESERVE

Kind of Product	Amount of Reserve (in barrels)
Wyoming General	10,441
Regular Gasoline	125,979
Unleaded Gasoline	9,570
ISO Butane	5,000
Saharan Light Oil	251,407
Wyoming Sour oil	60,000
Montana/Dakota Sweet oil	85,500
West Texas Sour oil	77,500
No. 2 Fuel oil	1,000
Asphalt	4,704
Other crude oil	17,882
No. 6 Fuel oil	12,543

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, AT CHICAGO

IN RE:

ENERGY COOPERATIVE, INC., a Delaware corporation,
Debtor.

Bankruptcy No. 81 B 005811
(Chapter 11 Case)

NOTICE OF ORDER AND BAR DATE

To all creditors, entities and parties in interest in the above-captioned matter:

You are hereby notified that, on June 19, 1981, pursuant to Application by Energy Cooperative, Inc., Debtor in Possession ("the Debtor"), The United States Bankruptcy Court For The Northern District of Illinois, Eastern Division, at Chicago, entered a certain Order in the above-captioned matter in regard to said Application ("the Order"), directing that all creditors, entities, and parties in interest who have, claim, or assert, or may have, may claim, or may assert, any right, title, or interest, including, but not limited to, any lien, security interest, or encumbrance, in or to any inventory, including, but not limited to, wet barrel inventory, or proceeds thereof, of Energy Cooperative, Inc. or the Debtor (hereinafter collectively "the Inventory") shall join themselves as parties to, or intervene in, a certain Adversary Proceeding in this Reorganization Case, Adversary Proceeding No. 81-A-2075, filed by the Debtor and certain banks on June 18, 1981 ("the Adversary Proceeding"), stating in any such joinder or intervention the grounds on which any such right, title or interest is or may be claimed or asserted.

YOU ARE HEREBY FURTHER NOTIFIED THAT,

PURSUANT TO THE TERMS OF THE ORDER, ANY CREDITOR, ENTITY, OR PARTY IN INTEREST NOT SO JOINING OR INTERVENING IN THE ADVERSARY PROCEEDING BY THE CLOSE OF BUSINESS ON JULY 20, 1981 IS AND SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED, FROM CLAIMING OR ASSERTING ANY RIGHT, TITLE OR INTEREST IN OR TO ANY OR ALL OF THE INVENTORY, OR ANY PROCEEDS THEREOF.

You are hereby further notified that, pursuant to the terms of the Order, the Debtor may sell or liquidate part or all of the Inventory, in such lots and in such manner as it deems appropriate, free and clear of any and all liens, encumbrances, and/or other rights and interests of any creditors, entities or parties in interest, unless any such right, title or interest has been asserted by any such creditor, entity or party in interest in a timely and proper manner in the Adversary Proceeding.

Copies of the Application, the Order and the Adversary Proceeding, and other pleadings and documents relevant to this Reorganization Case and this Notice of Order and Bar Date are available for inspection, during regular business hours, at the offices of The Clerk of The United States Bankruptcy Court, 219 South Dearborn Street, Chicago, Illinois 60604, and should be consulted for further information and details concerning the matters contained in this Notice of Order and Bar Date.

Norman H. Nachman, Esq.
Allan G. Sweig, Esq.
Nachman, Munitz & Sweig, Ltd.
115 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1480

Attorneys for Energy Cooperative, Inc., Debtor in Possession

Dated: June 19, 1981

ENERGY COOPERATIVE, INC.,
Debtor in Possession

By:_____
One of its Attorneys

Exhibit D
page 1 of 1

Appendix J

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AT CHICAGO

IN RE:

ENERGY COOPERATIVE, INC., a Delaware corporation,
Debtor.

Bankruptcy No. 81 B 005811
(Chapter 11 Case)

STIPULATION AND AGREED ORDER AMENDING ORDER GRANTING APPLICATION BY ENERGY COOPERATIVE, INC., DEBTOR-IN-POSSESSION (1) FOR AUTHORITY TO COMPROMISE SETTLE AND COLLECT EXCHANGE BALANCES, (2) FOR AUTHORITY TO SELL INVENTORY AND CONTRACT RIGHTS UNDER EXCHANGE AGREEMENTS, AND (3) FOR AN ORDER FIXING BAR DATE AND APPROVING NOTICE THEREOF, DATED JUNE 19, 1981

At Chicago, Illinois, in and for said District.

Energy Cooperative, Inc., Debtor-in-Possession (hereinafter referred to as "the Debtor"), by its attorneys of record, Allan G. Sweig, of the law firm Nachman, Munitz & Sweig, Ltd., the Official Unsecured Creditors' Committee of the Debtor (hereinafter referred to as "the Committee"), by its attorneys of record, Malcolm M. Gaynor, of the law firm Schwartz, Cooper, Kolb & Gaynor, and Continental Illinois National Bank and Trust Company of Chicago, individually and as agent for various commercial banks (hereinafter referred to as "Continental"), by its attorneys of record, Mayer, Brown & Platt, agreeing and stipulating that the Order Granting Application by Energy Cooperative, Inc., Debtor-in-Possession (1) For Authority to Compromise, Settle and Collect Exchange Balances, (2) For

Authority to Sell Inventory and Contract Rights Under Exchange Agreements, and (3) For an Order Fixing Bar Date and Approving Notice Thereof, dated June 19, 1981 (hereinafter referred to as "the June 19, 1981 Order") previously entered by this Court, specifically paragraph 1(iii) thereof, should be amended, so as to clarify the scope and extent of the proviso contained in said sub-paragraph, with the Debtor, the Committee, and Continental, stating that the amendment to said sub-paragraph is for purposes of clarification only, and not a substantive change in said Order, and

This Court, having reviewed the terms of said amendment, and being duly advised in the premises, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED that subparagraph 1(iii) of the June 19, 1981 Order, which states as follows:

> (iii) where appropriate, to adjust and compromise any disputed amounts or obligations owing under the Exchange Agreements; provided, that the Debtor shall make no adjustment, compromise or settlement of any amounts or obligations owing under the Exchange Agreements, which adjustment, compromise or settlement, if it had been made prior to the commencement of this reorganization case, could be avoided by the Debtor or a trustee, pursuant to applicable provisions of the Bankruptcy Code;

should be, and hereby is, deleted and the following new subparagraph should be, and hereby is, substituted therefor as paragraph 1(iii):

> (iii) where appropriate, to adjust and compromise

any disputed amounts or obligations owing under the Exchange Agreements, provided, however, that the Debtor has no authority to settle, adjust or compromise any claim, cause or right, which claim, cause or right could form the basis of any cause of action which may be brought pursuant to any avoiding or recovery provisions of the *Bankruptcy Code*.

AND IT IS HEREBY FURTHER

ORDERED, ADJUDGED AND DECREED that the remaining portions of the June 19, 1981 Order shall remain in full force and effect, and that the amendment of sub-paragraph 1(iii) as set forth in this order be, and hereby is, effective, *nunc pro tunc*, as of June 19, 1981.

Dated: 7/23/81

/s/ FREDERICK J. HERTZ

Frederick J. Hertz
United States Bankruptcy Judge

Approved as to form and content:

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
individually, and as agent
("Continental")

By: MAYER, BROWN & PLATT
by J. ROBERT STOLL

One of its attorneys

ENERGY COOPERATIVE, INC.,
Debtor-in-Possession
("the Debtor")
By: /s/ ALLAN G. SWEIG

One of its attorneys

The Official Unsecured Creditors'
Committee of Energy Cooperative,
Inc., Debtor-in-Possession
("the Committee")
By: /s/ RICHARD M. BENDIX, JR.

One of its attorneys

Appendix K

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re

ENERGY COOPERATIVE, INC.,

Debtor.

Chapter 11
No. 81 B 05811

ENERGY COOPERATIVE, INC.,

Plaintiff,

vs.

Adversary No.
82 A 1658

PHILLIPS PETROLEUM COMPANY,

Defendant.

COMPLAINT TO RECOVER EXCHANGE BALANCE

Energy Cooperative, Inc., as debtor in possession (ECI), for its complaint against Phillips Petroleum Company (Phillips), states:

1. On May 15, 1981, ECI, as debtor, filed its voluntary petition for reoganization under chapter 11 of title 11 of the United States Bankruptcy Reform Act (the "Code"). Pursuant to §1107(a) of the Code, ECI possesses all of the rights and powers and performs all of the functions and duties of a trustee serving in a case under chapter 11.

2. Jurisdiction over this proceeding is invoked pursuant to §1471 of the Code.

3. Venue is placed in this court pursuant to §1473(a) of the Code.

4. Phillips is a corporation having a place of business in Bartlesville, Oklahoma.

5. On and prior to May 15, 1981, the debtor and

Phillips effected various exchange transactions under and pursuant to their Exchange Agreement under which Phillips became indebted to the debtor as follows:

416,490 gals. Regular due ECI at $.98	=	$ 408,160.20
1,150,753 gals. Unleaded due ECI at 1.005	=	1,156,506.77
		$1,564,666.97

6. In connection with the aforesaid transactions, Phillips became indebted to the debtor for said value of the aforesaid products, namely, $1,564,666.97. The value of said products due to ECI by Phillips constitutes property of the estate in the above-captioned chapter 11 case.

7. Phillips has failed and now refuses to pay to ECI the said value of said products.

WHEREFORE, Energy Cooperative, Inc., debtor in possession, prays for judgment against Phillips in the sum of $1,564,666.97, plus interests and costs.

ENERGY COOPERATIVE, INC.,
Plaintiff

ALLAN G. SWEIG

By: /s/ ALLAN G. SWEIG

One of Its Attorneys

NACHMAN, MUNITZ & SWEIG, LTD.
115 South LaSalle Street
Chicago, Illinois 60603
312/263-1480

DATED: May 5, 1982

Appendix L

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

ENERGY COOPERATIVE, INC., a Delaware corporation,

Debtor.

Chapter 11

No. 81 B 05811

ENERGY COOPERATIVE, INC., a Delaware corporation, Debtor-In-Possession,

Plaintiff,

vs.

PHILLIPS PETROLEUM CO.,

Defendant.

Adversary No. 82 A 3736

COMPLAINT TO RECOVER PREFERENTIAL TRANSFER

Energy Cooperative, Inc., debtor and debtor-in-possession ("ECI"), by its attorneys, for its complaint to recover a preferential transfer made to Phillips Petroleum Co., defendant, alleges:

Jurisdiction and Venue

1. Jurisdiction over this proceeding is invoked pursuant to section 1471 of title 28, United States Code (the "Code").

2. Venue is placed in this court pursuant to section 1473(a) of title 28 of the Code.

The Parties

3. ECI commenced this chapter 11 case on May 15, 1981 by filing its petition pursuant to the provisions of section 301 of title 11 of the Code. ECI is in possession of its property and, pursuant to section 1108 of title 11

of the Code, is operating such business as necessary and approved by the Court.

4. Defendant is a corporation having its main office in Bartlesville, Oklahoma.

5. Prior to the commencement of this chapter 11 case defendant entered into exchange transactions with ECI under which petroleum products were transferred or delivered to and from ECI, and/or defendant sold and delivered petroleum products, other goods, wares or services to ECI.

Cause of Action

6. On or within 90 days before the date on which this chapter 11 case was commenced, ECI made transfers and/or payments to defendant on account of antecedent debts then owed by ECI to defendant, which, after deducting subsequent extentions of new credit, if any, aggregated $7,320,762.00 (hereinafter called the "Preferential Amount"), as more particularly herein below set forth.

6(a) ECI made transfers to the defendant totaling $7,320,762.00 on account of antecedent debts then owed by ECI to defendant under various agreements for the exchange of finished petroleum products.

(1) Attached hereto as Exhibit A is an "Exchange Activity Report" for the period December 1, 1980 through May 14, 1981 which summarizes all daily receipts and deliveries of products and the balances for all exchange contracts between ECI and the defendant, which report combines the volume of daily receipts and deliveries for all products under all exchange contracts and values such products respectively at their market prices as of May 15, 1981.

(2) Attached hereto as Exhibit B is an "Exchange Activity Report" for the period December 1, 1980 through May 14, 1981 which summarizes separately the daily receipts and deliveries of products and the balances for each exchange con-

tract between ECI and defendant. This report combines the volume of daily receipts and deliveries for all products for each respective exchange contract and values the respective products at their respective market prices as of May 15, 1981.

(3) Attached hereto as Exhibit C is an "Exchange Activity Report" for the period December 1, 1980 through May 14, 1981 which reflects the daily detail of all transactions for each exchange contract between ECI and the defendant. This report details each transaction for each contract by product and values such products at their respective market prices as of May 15, 1981.

6(b) ECI made payments to the defendant totaling $ -0- on account of antecedent debts then owed by ECI to defendant for transportation, quality and location differentials in connection with the above-referenced agreements for the exchange of finished petroleum products and other miscellaneous payments made on account of antecedent debts owed to defendant. Attached hereto as Exhibit D is a schedule of payments detailing such amounts paid by ECI to the defendant.

7. At all times on or within 90 days before the date on which this chapter 11 case was commenced, ECI was insolvent as said term is defined in section 101(26) of title 11 of the Code.

8. The transfer of the Preferential Amount enabled defendant to receive more than it would have received if this case were a case under chapter 7 of title 11 of the Code, the payment of the Preferential Amount had not been made, and defendant received payment of its debt to the extent provided by the provisions of title 11 of the Code.

9. The transfer of the Preferential Amount made to defendant constitutes a preference within the purview of section 547(b) of title 11 of the Code and is voidable by ECI pursuant to the provisions of said section.

WHEREFORE, ECI prays that an order be entered

avoiding the transfer of the Preferential Amount made to defendant; that judgment be entered against defendant in the sum of the Preferential Amount, plus interest at the legal rate from and after the date of the transfer of the Preferential Amount and that the court enter such other orders as to it shall seem proper.

ENERGY COOPERATIVE, INC.
Debtor and Debtor-In-Possession

By /s/ Allan G. Sweig
One of Their Attorneys

NACHMAN, MUNITZ & SWEIG, LTD.
115 South LaSalle Street
Chicago, Illinois 60603
312/263-1480

ANTHONY E. CASCINO, JR.
Secretary and General Counsel
ENERGY COOPERATIVE, INC.
6300 N. River Road
Rosemont, Illinois 60018
312/692-6800

DATED: OCT 14 1982

Appendix M

§ 553. **Setoff**

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that –

(1) the claim of such creditor against the debtor is disallowed other than under section 502(b)(3) of this title;

(2) such claim was transferred, by an entity other than the debtor, to such creditor –

(A) after the commencement of the case; or

(B)(i) after 90 days before the date of the filing of the petition; and

(ii) while the debtor was insolvent; or

(3) the debt owed to the debtor by such creditor was incurred by such creditor –

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor.

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6) or 365(h)(1) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the latter of –

(A) 90 days before the date of the filing of the petition; and

Appendix N

§ 547. Preferences

(a) In this section –

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer –

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was

insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

(3) of a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected before 10 days after such security interest attaches;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest[1] for such debt on the later of –

(A) (i) with respect to a transfer to which subsection (b)

(4) (A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b) (4)(B) of this section applies, one year before the date of the filing of the petition; and

---

[1] So in original. Probably should read "interests".

(B) the date on which new value was first given under the security agreement creating such security interest; or

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title.

(d) A trustee may avoid a transfer of property of the debtor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; and

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597.